Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

UNITED STATES ex rel.
SALVATORE A. CIMORELLI,

Petitioner,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

EVAN T. LAWSON
PATRICIA A. LANG
LAWSON & WEITZEN
425 Summer Street
Boston, Massachusetts 02210
(617) 439-4990
Counsel of Record
for Petitioner

May 5, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1) Whether in a *qui tam* action under the False Claims Act, 31 U.S.C. § 3729 et seq., a claimant is required to produce direct evidence of a fraudulent claim to refute the defendant's proffered explanations in order to defeat a motion for summary judgment?

2) Whether the First Circuit Court of Appeals was correct in reading *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) to require a *qui tam* claimant to discredit an explanation offered by the defendant to contradict the claimant's evidence?

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INTRODUCTION

The petitioner Salvatore Cimorelli ("Cimorelli") respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the First Circuit, entered on February 4, 1994.

OPINIONS BELOW

The case was decided on a summary judgment motion in the United States District Court for the District of Massachusetts, an unreported opinion. The opinion of

the United States Court of Appeals for the First Circuit is unreported at 16 F.3d 401, 1994 WL 29993 (1st Cir. Mass. 1994). Both decisions are reproduced in the Appendix.

BASIS FOR JURISDICTION

The Judgment of the United States Court of Appeals for the First Circuit was entered on February 4, 1994. This Court's jurisdiction is invoked under 28 U.S.C § 1254.

STATUTE INVOLVED

United States Code, Title 31: False Claims Act, §§ 3729-32, appears in the Appendix hereto.

STATEMENT OF THE CASE

Cimorelli brought an action against General Electric Company ("GE") pursuant to the *qui tam* provision of the False Claims Act, 31 U.S.C. § 3730(b)(1).[1] On April 9, 1993, the District Court entered an Order allowing GE's motion for summary judgment which disposed of all claims with respect to all parties.(App.4). Cimorelli appealed the decision to the United States Court of Appeals for the First Circuit. On February 4, 1994, the Court of Appeals affirmed the decision of the District

[1] The United States did not elect to intervene but made provisions for Cimorelli to proceed in the name of the United States pursuant to 31 U.S.C. § 3730(b)(2)(A).

Court and determined that Cimorelli failed to produce evidence to refute GE's proffered explanations for altered vouchers sufficient to withstand GE's motion for summary judgment.(App.1).

The facts may be summarized as follows: Cimorelli was employed by GE from July 1968 to July 1989. From January, 1973 until July 20, 1989, Cimorelli was employed as an engineer in the Aircraft Engines Division at the Lynn, Massachusetts, plant. During these years, GE entered into many contracts with the government, including contracts to develop and/or produce the F-404 aircraft engine and other aircraft engines. Cimorelli alleged that from the early 1970's until 1989, GE submitted false labor vouchers to the government in violation of the False Claims Act. The parties did not dispute the fact that bills, based on labor vouchers completed by GE employees, were submitted to the government by GE. Specifically, Cimorelli asserted that GE instructed its employees to fill out labor vouchers in pencil. Cimorelli contended that these vouchers would be later altered by GE supervisors in order to shift charges from government contracts which were over budget to government contracts which were under budget prior to the submission of such bills to the government for payment. GE stated there were "legitimate reasons" for voucher alteration and moved for summary judgment on the ground that there was insufficient evidence of voucher falsification to create a triable issue and on the ground that there was no evidence of a false claim to the government. Cimorelli opposed the motion for summary judgment by arguing that the record established that GE maintained a widespread, consistent practice of submitting fraudulent

claims and further, that GE wrongfully interfered with his access to the discovery which would uncover direct evidence that false claims were submitted to the government. The District Judge allowed GE's motion for summary judgment and determined that Cimorelli was not wrongfully denied discovery, a decision affirmed by the First Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT INCORRECTLY DECIDED THAT A RELATOR MUST PRODUCE DIRECT EVIDENCE OF A FRAUDULENT CLAIM TO REFUTE THE MOVANT'S PROFFERED EXPLANATIONS IN ORDER TO DEFEAT A MOTION FOR SUMMARY JUDGMENT IN A *QUI TAM* ACTION.

(i) There was Clear Circumstantial Evidence of False Claims

The courts below determined that Cimorelli failed to present evidence to refute GE's "legitimate reasons" for voucher tampering. The First Circuit Court of Appeals failed to give Cimorelli the benefit of all factual allegations and reasonable inferences in support of his claim as required by the standard established in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), which held that summary judgment is warranted when the record, viewed in light most favorable to the nonmoving party, shows no genuine issue of material fact. *Id.* at 322. Rather than viewing the evidence in a light most favorable to Cimorelli, the court wholly accepted the "legitimate reasons" proffered

by GE in its determination that no genuine issue of material fact existed. In addition, the court's refusal to give Cimorelli the benefit of all inferences runs contrary to decisions of the courts of appeal for other circuits. These reasons compel the granting of the writ of certiorari.

The False Claims Act holds any person liable who: (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government. (App.16). Under the False Claims Act, civil penalties plus treble damages may be imposed for presenting a false or fraudulent claim to the government.(App.17). Cimorelli was required to prove two elements for his cause of action: (1) a claim for payment from the government was made and (2) the claim was false or fraudulent.

According to the evidence, when Cimorelli first began to work for GE in Lynn, he was instructed to fill out his labor vouchers in pencil and was reprimanded if he used pen.(Record Vol. I, 153-54). He was told and instructed in writing by his supervisor that the vouchers must be filled out in pencil "because there's cases where the numbers may have to be changed." (Record Vol. I, 154). Cimorelli specifically recalled his supervisor instructing GE employees to use pencil to fill out labor vouchers for work performed on government contracts for the T700 and TF34 aircraft engines.(Record Vol. I, 160). Indeed, when Cimorelli continued to refuse to use pencil, GE's offer to move him from Schenectady N.Y. to Lynn was reduced by $1,300.00.(Record Vol. I, 155).

In addition, Cimorelli was given a memorandum instructing him that "[i]n order to avoid questions about working unauthorized overtime" he should charge his time to a different contract on which overtime was approved and "spread it around from week to week to avoid hitting any engine too heavily."(Appellant's Brief, Addendum 14). This evidence demonstrates that false or fraudulent claims were made through the labor vouchers.

Secondly, deposition testimony of Christy Chipouras ("Chipouras"), an employee of GE from February 11, 1980, to June of 1986, was filed in the District Court for the purpose of demonstrating that GE made claims for payment from the government. In his employment position, Chipouras was responsible for forecasting GE's budget for his department and for issuing the Development Activity Numbers (DAN) each week.[2] (Record Vol. I, 244). The DANs enabled GE to determine which contracts were overrun.(Record Vol. I, 246). When Chipouras noticed a contract was overrun, he would immediately inform his supervisor. He testified that even if a contract had gone over budget "sometimes my immediate boss would let the work go on using another charge number" so that the charges would go against another contract.(Record Vol. I, 246).

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[2] The purpose of the DANs was to keep track of the charges against each specific contract so that GE could account for the actual amount charged to the contract per month compared to the forecast that was prepared for that month. Each DAN is a separate number given to GE employees so that they can list them on their labor vouchers to keep track of the hours worked on each contract. (Record Vol. I, 245-46).

When a contract went over budget and the DANs were closed for that contract, Chipouras would send around a photocopied, hand-written memo or "DAN listing" to the engineers directing them to charge work for an over budget contract to a different number.(Record Vol I, 256-57). If a contract was under budget when the vouchers came in, Chipouras' supervisor would "just erase or cross out the [DAN] number that was over budget and write in another [DAN] number that was under budget, whether it was in the contract that he was working on or not."(Record Vol I, 249). Chipouras testified that he was instructed to tell the engineers to leave the vouchers blank and that he would "take care of it at the end of the day."(Record Vol I, 315).

At his supervisor's instruction, Chipouras erased entries on vouchers and put in new ones.(Record Vol. I, 280). If, like Cimorelli, an employee refused to use pencil, and filled out a voucher in pen, Chipouras would cross out the DAN and put a new one in.(Record Vol. I, 274). Chipouras' testimony corroborated Cimorelli's allegation that labor vouchers were made out in pencil so that they could be altered.

The District Court granted summary judgment because Cimorelli did not "identify specific incidents of voucher falsification which can be linked to false claims against the government." (App.13). Chipouras testified to one specific instance, however, when he received instructions to continue to work on the RM-12, a Swedish contract, when he knew from the MAPS report that there was no money left for that contract. According to Chipouras, on this particular RM-12 contract, charges were made to the government "404 contract."(Record Vol. I, 259).

Cimorelli's testimony revealed that false or fraudulent claims were made through the altered labor vouchers and the testimony of Chipouras exposed the fact that GE used internal budgets in order to identify which government contracts were under budget. Consequently, the evidence demonstrates that GE falsified labor vouchers and submitted bills based on such labor vouchers to the government in order to charge under budget government contracts, a violation of the False Claims Act.

The First Circuit Court of Appeals did not base its opinion on the logic expressed by the District Court. Rather, the Court of Appeals accepted Cimorelli's position that false claims were made but then allowed GE to proffer an explanation for the altered vouchers. The Court of Appeals then again shifted the burden to Cimorelli to negate GE's explanation that alterations were made for legitimate reasons. The Court of Appeals consequently created a "paper" trial by affidavit.

Summary judgment should not be granted unless it is clear that a trial is unnecessary. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party may prevail as a matter of law." *Anderson* at 251-52. Since there was evidence that the government was billed for fraudulent labor vouchers by GE, there was a genuine issue of material fact which precluded summary judgment.

Summary judgment must be entered against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and

on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. Any doubt as to the existence of a genuine issue for trial should be resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970). GE sought summary judgment on the ground that Cimorelli, the party with the burden of persuasion at trial, had no evidence. The court should have properly inferred from the evidence that false or fraudulent claims were made through the labor vouchers.

When the moving party attacks the record evidence, the burden of production shifts to the nonmoving party. *Celotex Corp.*, 477 U.S. at 333 n.3. Summary judgment should be granted only if the nonmoving party fails to respond. *Id; See also Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186 (5th Cir. 1988) (A nonmovant faced with a motion for summary judgment is not required to proffer its own competing summary judgment evidence to survive motion; nonmovant may answer summary judgment motion by arguing that summary judgment evidence proffered by movant raises fact issue which must be resolved at trial). Cimorelli rehabilitated the evidence attacked by GE and also argued the necessity of further discovery. Thus, Cimorelli satisfactorily met his burden of production to prevent summary judgment from entering against him.

This Court has indicated its intent to encourage the use of summary judgment in suitable cases. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986). As yet, it has not indicated exactly how to do so while preserving the nonmoving party's procedural protections. It is difficult to

understand what the Court was trying to say in *Celotex*, or what it should have said to promote the use of summary judgment in a sensible way. Indeed the majority, concurring and dissenting opinions do not reach a consensus on how to do so. This case presents an opportunity for this Court to further define the *Celotex* standard for summary judgment.

The First Circuit Court of Appeals required the burden of production to repeatedly shift from the movant to the nonmovant, in effect creating a trial by affidavit. The court should not have required Cimorelli to refute the "legitimate reasons" for voucher tampering which were offered by GE. *See, e.g., Jones v. Western Geophysical Company of America*, 669 F.2d 280, 283 (5th Cir. 1982) (that the nonmovant is unlikely to prevail at trial or that the mover's facts appear more plausible are not reasons to grant summary judgment). Since the First Circuit Court of Appeals interpreted, overly broad, the *Celotex* decision to require Cimorelli to refute GE's proffered excuses, the granting of a writ of certiorari for the purpose of revisiting *Celotex* is warranted.

(ii) The Court of Appeals Paid Lip Service to Drawing Inferences

That GE submitted benign explanations for its labor voucher alteration system does not entitle it to summary judgment as long as Cimorelli's evidence supports the inference that false claims were made. *See Grand Union Company v. United States of America*, 696 F.2d 888, 890 (11th Cir. 1983). Inferences are normally drawn in favor of the nonmoving party. *Sarit v. U.S. Drug Enforcement*

Admin., 987 F.2d 10, 13 (1st Cir.), *cert. denied*, 114 S.Ct. 241 (1993). Indeed, on a motion for summary judgment, if an inference can be drawn against the moving party, the court is required to do so. *Celotex Corp.*, 477 U.S. at 330 n.2 ("If . . . there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment . . . "). The court, for purposes of GE's motion for summary judgment, was required to infer from the pervasive voucher alteration scheme, coupled with GE's admission that vouchers "completed by employees of GE" were used "to prepare claims for payment to the United States," and the admission that vouchers were sometimes altered "for various reasons," that false charges were submitted to the government based on altered vouchers. Cimorelli demonstrated that reasonable inferences from documents and from testimony could support a jury verdict in his favor and thus, met his burden as the nonmoving party. *See, e.g., Davidson v. John Deere & Co.*, 644 F. Supp. 707 (D.C. Ind. 1986). Instead, the Court of Appeals refused to draw reasonable inferences stating "[b]ut in this instance the objective conduct – namely, changes in pencilled records – is ambiguous, despite the conclusory epithets offered by Chipouras." (App.4).

In deciding a motion for summary judgment the court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2nd Cir. 1987). Further, if such a motion is to be granted, "not only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding the

inferences to be drawn from them." *Id.* Since there was evidence to warrant the inference that the government was billed for fraudulent labor vouchers, there was a genuine issue of material fact that precluded summary judgment.

The Court of Appeals determined "there was inadequate evidence for a jury as to at least one critical element, namely, the actual submission of false or fraudulent claims to the government."(App.4). The courts never inquired as to whether Cimorelli found any altered cards as evidence of his claim. And further, it was not necessary to show that the falsified vouchers were submitted directly to the United States to establish a violation of the False Claims Act.

(iii) In Conflict with other Circuits, the Summary Judgment Standard is not as Severe in *Qui Tam* Actions as the Court of Appeals Set Forth

The First Circuit Court of Appeals refused to infer false claims from the evidence. In contrast, other federal courts have been willing to grant such inferences in actions, as here under the False Claims Act. For example, it has been held that the right to recover under the False Claims Act can be established by circumstantial evidence. *United States v. Hangar One, Inc.*, 536 F.2d 1155, 1158 (5th Cir. 1985), citing *United States v. Milton Marks Corp.*, 240 F.2d 838 (3rd Cir. 1957). In *Hangar One*, the Government brought an action under the False Claims Act alleging that the defendant knowingly submitted defective materials for artillery shells during the Vietnam war. The defendant was to inspect the shells before delivering

them to the government. The government claimed the inspections were fraudulently conducted in that the defendant's representatives either completely failed to inspect the shells or took shells that had already been rejected as defective and returned them to the production line for shipment. As a result, the United States received approximately 18,000 defective shells. The defendants submitted a motion to dismiss accompanied with affidavits denying the fraud. The Government submitted affidavits of persons who said they had engaged in fraudulent acts concerning shipments other than those in issue in the case. The court treated the motion as one for summary judgment and entered judgment in favor of the defendant. The Government appealed to the Fifth Circuit which found the Government's evidence sufficient to show circumstantially that fraud occurred in connection with the shipments in issue and expressed:

> The trial court also ruled that the plaintiff's failure to trace the defective shells to the point of acceptance by the government was a bar to recovery stating this failure "leaves the subject one of speculation . . . " 406 F.Supp. at 133. We agree that this may be a matter of speculation, and because it is such, summary judgment is improper. Furthermore, as appellant correctly argued, if any tracing requirement does exist, it would appear to be more relevant to the question of damages than to the issue of liability. The right to recover can be established by circumstantial evidence. *United States v. Milton Marks Corp.*, 240 F.2d 838 (3rd Cir. 1957).

Hangar One, 563 F.2d at 1158.

In Cimorelli's case there was evidence, albeit circumstantial, that false claims were made to the government in violation of the False Claims Act.

When all ambiguities and inferences are resolved in Cimorelli's favor and the allegations of the nonmovant are taken as true, the record contains evidence sufficient to create a genuine issue of material fact as to whether false claims were submitted by GE to the government. The court should not have absolutely accepted GE's statement that vouchers were altered for "various benign" reasons.(App.4). Because there was evidence to warrant the inference that the government was billed for fraudulent labor vouchers, there was a genuine issue of material fact that should have correctly precluded the motion for summary judgment.

Finally, the District Court found that Chipouras' testimony was "largely conclusory, and fails to identify specific incidents of voucher falsification which can be linked to false claims against the government."(App.13). As stated previously, Chipouras testified about a specific incident concerning the Swedish contract. Furthermore, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party. *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986), citing *Anderson v. Liberty Lobby Inc.*, 477 U.S. at 253. The majority opinion in *Celotex* made statements to the effect that the nonmoving party could successfully oppose a motion

for summary judgment with evidence that would be inadmissible at trial.[3] Justice Rehnquist found that Rule 56(e) permits the nonmoving party to oppose summary judgment with any of the materials listed in Rule 56(c), other than the pleadings. *Celotex*, 477 U.S. at 323. Accordingly, the District Court was not to evaluate the credibility or persuasiveness of evidence at the summary judgment stage.

To the contrary, it seems that the First Circuit Court of Appeals accepted Chipouras' testimony stating it "was apparently promised a share of whatever reward Cimorelli might obtain."(App.2). And the Appeals Court agreed with Cimorelli that "if the [voucher alterations] were dispositive, choosing between explanations might well be an issue for the jury." (App. 4). However, the Court required Cimorelli to refute GE's explanations for pencilled labor vouchers and later alterations.(App. 4). If the Court of Appeals decision is upheld, it will increase the uncertainty of the proceedings and work against the Court's aim of a beneficial use of the summary judgment motion.

(iv) If the Decision is Upheld, it will Gut Congressional Intent to Empower Private Attorney Generals

The False Claims Act was adopted in 1863 and signed into law by President Abraham Lincoln to combat rampant fraud in civil war defense contracts. S. Rep. No. 345,

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[3] The required showing, however, "do[es] not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment." *Celotex*, 477 U.S. at 324.

99th Cong. 2d Sess. 8 (1986). "The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services." S.Rep. No. 345, *supra* at 9. The United States is entitled to recover under the False Claims Act solely on the proof that such claims were made, without proof of damages. *Id.* at 8. "The fact that the claims in this case were not presented directly to the government, but were made to it indirectly though the contractors, does not prevent recovery under the False Claims Act." *Murray & Sorrenson, Inc. v. United States*, 207 F.2d 119, 123 (1st Cir. 1953). *See also United States v. Lagerbusch*, 361 F.2d 449 (3rd Cir. 1966) ("We have no doubt that the False Claims Act covers such an indirect mulcting of the government"); *United States v. Consolidated Industries, Inc.*, 720 F.Supp. 919, 921 (N.D.Al.1989) ("A false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment for the claim would ultimately result in a loss to the United States").

This Court has held that the chief purpose of the False Claims Act "[is] to provide for restitution to the government of money taken from it by fraud." *U.S. v. Halper*, 490 U.S. 435, 444, (1989) citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *see also Rainwater v. U.S.*, 356 U.S. 590 (1957) (objective of Congress in enacting former section 231 of this title was broadly to protect funds and property of the government from fraudulent claims). The design of the statute therefore, is to discourage fraud against the government, and the purpose of the *qui tam* provisions is to encourage those with knowledge of fraud to come forward. *Neal v. Honeywell, Inc.*, 826

F.Supp. 266 (N.D.Ill.1993). Moreover, the purposes of the 1986 amendments to the False Claims Act were to loosen restrictive judicial interpretation of the Act's liability standard and burden of proof. *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Acc. Ins. Co.*, 721 F.Supp. 1247 (S.D.Fla. 1989). If the courts can demand direct evidence to refute a movant's proposed "legitimate reasons" at the summary judgment stage, the stated purposes of the False Claims Act will be inevitably obliterated.

CONCLUSION

For all of the foregoing reasons, petitioner Salvatore Cimorelli respectfully requests this Honorable Court to grant his petition for certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

EVAN T. LAWSON
PATRICIA A. LANG
LAWSON & WEITZEN
425 Summer Street
Boston, Massachusetts 02210
(617) 439-4990

May 5, 1994

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SALVATORE A. CIMORELLI

Plaintiff, Appellant,

No. 93-1549 v.

GENERAL ELECTRIC COMPANY,

Defendant, Appellee.

Before

Cyr, *Circuit Judge*,

Bownes, *Senior Circuit Judge*,

and Boudin, *Circuit Judge*.

Per Curiam. Salvatore Cimorelli, a long-time former employee of General Electric Company, brought suit against GE in 1989 under the False Claims Act, 31 U.S.C. §§ 3729-33. The gist of Cimorelli's complaint was that at GE aircraft engine operations in Lynn, Massachusetts, GE employees had altered pencilled labor records in order to shift labor charges from government contracts that were over budget to government contracts that were under budget. Similar alterations were charged with respect to steam turbines made by GE in Lynn. Cimorelli claimed that the alterations had occurred from the early 1970s until around 1985.

The False Claims Act imposes civil penalties plus treble damages for *inter alia* presenting a false or fraudulent claim to the federal government or using a false record or statement to obtain payment or approval of a

false or fraudulent claim. *Id.* § 3729(a). False Claims Act suits may be brought by private parties on behalf of the United States, although government attorneys may take charge of the litigation if the government so chooses. *Id.* § 3730(b). Here, after reviewing the litigation, the federal government declined to participate. Accordingly, the suit has been conducted by Cimorelli who, if any recovery were obtained, would share in it to the extent provided by the False Claims Act. *Id.* § 3730(c).

The district court in December 1991 set a deadline for discovery of May 29, 1992. Extensive discovery was conducted by Cimorelli during the first half of 1992. GE says, without dispute from Cimorelli, that it produced a vast number of labor vouchers and other records. On the day the discovery ended, Cimorelli filed various motions accusing GE of hindering discovery. The motions were referred to a magistrate judge who denied them in June 1992, and the district court affirmed the magistrate judge in July 1992. New discovery motions made by Cimorelli in August 1992 were denied by the district court in September 1992.

In July 1992 GE moved for summary judgment, arguing among other points that there was no evidence of any false claim against the government, normally a critical element in a suit under the False Claims Act. *See United States v. McNinch*, 356 U.S. 595, 598-600 (1958). In addition to seeking further discovery, Cimorelli opposed summary judgment, relying centrally on deposition testimony of Christy Chipouras, another former employee of GE at the Lynn facility. Chipouras had given deposition testimony, described below, and was apparently promised a share of whatever reward Cimorelli might obtain.

On April 9, 1993, the district court granted GE's motion for summary judgment and issued a memorandum setting forth the court's reasons. The district court found that Chipouras' testimony was "largely conclusory, and fails to identify specific incidents of voucher falsification which can be linked to false claims against the government." Accordingly, the court found that there would be insufficient evidence to submit the case to a jury even on the premise, which the court tentatively adopted, that Cimorelli need prove his case only by a preponderance of the evidence (as opposed to clear and convincing evidence). Cimorelli now appeals the grant of summary judgment and the district court's refusal to allow further discovery.

Reserving the discovery issue for later discussion, the propriety of summary judgment turns on whether Cimorelli pointed the district court to sufficient evidence to permit a reasonable jury to find that a false or fraudulent claim was presented to the federal government relating to the Lynn aircraft engine or turbine operations. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Appellate review of the grant of summary judgment is plenary. *Sarit v. U. S. Drug Enforcement Admin.*, 987 F.2d 10, 13 (1st Cir.), *cert. denied*, 114 S.Ct. 241 (1993). Inferences are normally drawn in favor of the party opposing summary judgment. On the other hand, more than mere suspicion or speculation is required to justify a trial. *See Liberty Lobby*, 477 U.S. at 249-50.

In this instance, Chipouras testified in general terms that GE systematically charged labor costs to government contracts when the labor had been expended on other government contracts. This was accomplished in part, he

said, by having labor vouchers initially completed in pencil and then having them altered by other personnel, including Chipouras. He could remember only one specific mischarged contract – a case in which time on a private contract was charged instead to a federal government contract number – but he said that alterations were widespread and systematic.

GE offered various benign explanations for preparing labor vouchers initially in pencil and making later alterations. We agree with Cimorelli that, if this issue were dispositive, choosing between explanations might well be an issue for a jury. However, we agree with GE and the district court that whatever the explanation for pencilled labor vouchers and later alterations, there is no evidence whatever that any false or fraudulent claims were actually presented to the government. Although Cimorelli charged pervasive fraud and conducted extensive discovery, Cimorelli was unable to point to proof of a single instance in which a false or fraudulent claim was actually presented to the federal government.

Perhaps where a contractor's record-keeping conduct is unambiguously sinister, an inference might be drawn that the misconduct must have been translated into fraud. But in this instance the objective conduct – namely, changes in pencilled records – is ambiguous, despite the conclusory epithets offered by Chipouras. Under these circumstances and on this record, we agree that there was inadequate evidence for a jury as to at least one critical element, namely, the actual submission of false or fraudulent claims to the government. We do not reach GE's further contentions that clear and convincing evidence was the required standard of proof or that Chipouras'

testimony should be disregarded entirely because it was improperly purchased.

Cimorelli counters the claim that evidence is lacking by arguing that a negative inference should be drawn against GE because it engaged in "suppression" of evidence during discovery, and Cimorelli further argues that the district court abused its discretion in failing to permit further discovery and failing to hold an evidentiary hearing on contested issues concerning GE's alleged discovery misconduct. Cimorelli's opening brief included specific claims that GE did not produce certain information requested by Cimorelli and specific claims that GE deliberately removed items sought by Cimorelli from boxes of materials actually produced.

We think it unnecessary to discuss these allegations in detail. In its answering brief, GE offered an extremely detailed refutation of these allegations, taking them one by one. In answer to each one, it pointed to record materials to support its version of events. For the most part, GE said that the specific materials sought (1) were actually produced by GE but overlooked by Cimorelli or (2) were nonresponsive materials that did not have to be produced. GE responded in similar detail to other allegations by Cimorelli concerning supposed problems with the logistics of discovery.

On the face of this facially thorough refutation by GE, we turned to Cimorelli's reply brief naturally expecting that it would show where GE's version of events was wrong or at least that factual disputes existed as to some, if not all, of the GE explanations. Instead, the reply brief simply ignored GE's detailed answers and confined itself

to discussing the standard of proof on the merits and the admissibility of the Chipouras' allegedly purchased testimony. If Cimorelli is not prepared to dispute GE's answering brief by pointing out where it is wrong on the discovery issues, we are certainly not going to undertake that task ourselves. *Cf. United States v. Innamorati*, 996 F.2d 456, 468 (1st Cir. 1993) (issues not briefed will not be addressed).

Two further facts reinforce our sense that Cimorelli has not been unjustly treated in relation to discovery. One is that there is no indication that Cimorelli sought any extension of the discovery deadline until the day that the discovery period expired. The second is that despite the present claim that an evidentiary hearing should have been held to resolve disputes pertaining to discovery, it appears that Cimorelli never made such a request for an evidentiary hearing to the district court. In sum, we have no basis for finding that the district court abused its considerable discretion in the management of discovery in this case.

Affirmed.

February 4, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES ex rel. SALVATORE A. CIMORELLI, Plaintiff,	)	CA No. 89-2571-T
v.	)	
GENERAL ELECTRIC COMPANY Defendant.	)	

ORDER

April 9, 1993

TAURO, Ch.J.

For the reasons stated in the accompanying memorandum, Defendant's Motion for Summary Judgment is hereby ALLOWED. Plaintiff's Motion for Order Compelling Defendant to Authorize Justice Department to Release Any and All Evidence of Fraud Obtained by It Under Civil Investigative Demand is DENIED.

It is so ordered.

By the Court,

/s/ Joseph L. Tauro
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES ex rel.	)	CA No.
SALVATORE A. CIMORELLI,	)	89-2571-T
Plaintiff,	)	
	)	
v.	)	
	)	
GENERAL ELECTRIC COMPANY	)	
Defendant.	)	

MEMORANDUM

April 9, 1993

TAURO, Ch.J.

In November of 1989 Salvatore A. Cimorelli ("Cimorelli") initiated this action against his former employer, General Electric Company ("GE"), pursuant to the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33 (1988). The core allegation of Cimorelli's complaint is that GE, which had entered into various defense contracts with the government, violated the FCA by submitting claims for payment which were based upon falsified labor vouchers. The United States has elected not to intervene in this action, leaving Cimorelli to conduct it on his own. The question now before the court is whether Cimorelli has constructed a case that can withstand GE's motion for summary judgment.

I.

BACKGROUND

The FCA imposes civil penalties upon any person who "knowingly presents, or causes to be presented,

to . . . the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C.A. § 3729(a) (West Supp. 1992). The primary responsibility for investigating false claims belongs to the Attorney General, who may bring a civil action against anyone suspected of violating the FCA. *Id.* § 3730(a). A private person, or "relator" may also initiate a civil action under the FCA, but any such *qui tam*[1] action must be brought in the name of the government. *Id.* § 3730 (b) (1). *See United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F. 2d 46, 50 (4th Cir. 1992) ("[T]he United States is the real party of interest in any [FCA] suit, even where it permits a *qui tam* relator to pursue the action on its behalf.")

In this case, the latter course was followed. Pursuant to 31 U.S.C. § 3730 (b) (2), Cimorelli provided the government with a sealed copy of his complaint against GE, together with "all material evidence and information" in his possession. After reviewing these materials, the government elected not to intervene, allowing Cimorelli to

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[1] "Qui tam," which is Latin for "who as much as", is taken from the expression "qui tam pro domino rege quam pro se ipso in hac parte sequitur," meaning "who brings the action for the king as well as for himself." *See Erickson ex rel. United States v. American Inst. of Biological Sciences*, 716 F. Supp. 908, 909 n. 1 (E.D. Va. 1989) (citing W. Blackstone, *Commentaries on the Law of England* 160 (1768)). A *qui tam* action allows an informer "to become a 'private attorney general' with a portion of the recovery going to the informer and the remainder to the state." *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F. 2nd 17, 19 n. 2 (1st Cir. 1990), *cert denied*, ___ U.S. ___, 111 S. Ct. 1312 (1991). *See United States ex rel. Doe v. John Doe Corp.*, 960 F. 2d 318, 321-22 (2d Cir. 1992) (recounting the history of *qui tam* actions under the FCA).

proceed with the action. *See* 31 U.S.C.A. § 3730 (b) (4) (b) (West Supp. 1992). On July 7, 1992, GE filed the motion for summary judgment which is now before the court. There being no genuine issues of material fact, the court will address the merits of the motion.

II.

ANALYSIS

A. The Allegations

Cimorelli alleges that from the early 1970s until 1984 or 1985 supervisors at GE's plant in Lynn, Massachusetts systematically altered employee labor vouchers, pursuant to the instructions of management. Comp. ¶¶ 14-16. He claims that "the purpose and result of [these] alterations was to charge to the United States Government millions or as much as hundreds of millions of dollars more" than should have been charged to it. *Id.* ¶ 18.

GE contends that "[l]abor vouchers were and should have been altered to correct errors, when employees took personal time during working hours and then worked extended days to make up for the personal time, when there were changes in the contracts that were funding the effort involved, and for other perfectly legitimate reasons." Def's Mem. at 4-5 (footnotes omitted). GE claims that the evidence produced by Cimorelli is insufficient to show that these alterations were falsifications, or that any of them served as the basis for false claims against the government.

B. Summary Judgment

When, as here, a defendant moves for summary judgment and asserts a lack of evidence to support the case against it, "the plaintiff must establish the existence of a triable issue which is both genuine and material to his claim." *Pagano v. Frank*, 983 F. 2d 343, 347 (1st Cir. 1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). In order to do so, the plaintiff "must present definite, competent evidence to rebut the motion." *Mesnick v. General Elec. Co.*, 950 F. 2d 816, 822 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2965 (1992). "[E]vidence that is 'merely colorable or is not significantly probative' cannot deter summary judgment." *Wynne v. Tufts University Sch. of Medicine*, 976 F. 2d 791, 794 (1st Cir. 1992) (quoting *Anderson*, 477 U.S. at 249-50). Under the plain language of Rule 56(c), summary judgment must be entered against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

C. The Burden of Proof

There is some disagreement between the parties regarding the burden of proof applicable to this action. GE contends that Cimorelli must prove his case by clear and convincing evidence, while Cimorelli submits that his burden is a mere preponderance of the evidence. This dispute reflects the fact that, prior to 1986, "[t]he burden of proof in civil false claim cases . . . evolved through caselaw into an ambiguous standard." S. Rep. No. 345,

99th Cong., 2d Sess. 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272.[2] Congress eliminated this ambiguity in 1986 by explicitly providing that "[i]n any action brought under [the FCA], the United States [or its relator] shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence." False Claims Amendment Act of 1986, Pub. L. No. 99-562, § 5, 100 Stat. 3153, 3158 (codified at 31 U.S.C. § 3731 (c) (1988)).

GE maintains that section 3731 (c) should not apply in this case because it was enacted "after the conduct alleged by Cimorelli." Def's Mem. at 15 n.32. The court does not agree. Presumptively, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice." *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974).[3] Here,

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[2] Lacking statutory guidance, some courts applied a clear and convincing standard to FCA claims. *See United States v. Ekelman & Associates, Inc.*, 532 F. 2d 545 (6th Cir. 1976); *United States v. Foster Wheel Corp.*, 447 F. 2d 100 (2d Cir. 1971). In other circuits, a more lenient preponderance standard prevailed. *See Federal Crop. Insurance Corp. v. Hester*, 765 F. 2d 723 (8th Cir. 1985); *United States v. Thomas*, 709 F. 2d 968 (5th Cir. 1983).

[3] The competing presumption that "statutes affecting substantive rights and liabilities . . . have only prospective effect," *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985), does not apply here. "[T]he 1986 [FCA] Amendments [we]re remedial in nature, and not designed to affect substantive rights." *United States ex rel. La Valley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351, 1365 (D. Mass. 1988). *See Timberland Design, Inc. v. Federal Deposit Ins. Corp.*, 745 F. Supp. 784, 788 n.2 (D. Mass. 1990) ("[U]nder First Circuit case law the touchstone for deciding which presumption to apply . . . is whether retroactive application alters substantive rules of conduct and disappoints private expectations."), *aff'd*, 932 F. 2d 46 (1st Cir. 1991).

applying section 3731(c) in an action commenced over three years after its enactment is hardly unjust. GE's substantive obligation not to defraud the government was unchanged by the 1986 amendments.

Even if § 3731(c) were held not to apply here, it would remain to determine which burden of proof should apply under the pre-1986 version of the FCA. Ultimately, that question – which appears to be an open one in this circuit – need not be resolved by this court. Under either standard, Cimorelli had failed to produce evidence sufficient to withstand GE's motion for summary judgment.

D. Cimorelli's Evidence

In opposing GE's motion for summary judgment, Cimorelli relies entirely upon the deposition testimony of Christy Chipouras, another former GE employee.[4] Viewing this evidence in the light most favorable to Cimorelli, and indulging all reasonable inferences in his favor, *see E.H. Ashley & Co. v. Wells Fargo Alarm Services*, 907 F.2d 1274, 1277 (1st Cir. 1990), the court finds that GE is entitled to judgment as a matter of law. Chipouras's testimony is largely conclusory, and fails to identify specific incidents of voucher falsification which can be linked to false claims against the government. Absent additional

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[4] GE argues that Chipouras's testimony should be excluded because Cimorelli's lawyer "offered to pay [him], for his testimony, a fee contingent upon the outcome of this case." Def's Mem. at 8. The court shares GE's doubts regarding the ethical and legal propriety of such an arrangement, see DR 7-109(C); 18 U.S.C.A. § 201(c)(2) (West Supp. 1993), but finds a ruling on the issue unnecessary to the ultimate disposition of this case.

proof to corroborate Chipouras's broad allegations, there would be insufficient evidence to send the case to a jury.

Cimorelli maintains that his failure to produce such evidence is due in large part to GE's wrongful denial of access to discovery. The court is not persuaded by this contention. As Magistrate Judge Cohen observed in his order of June 24, 1992:

> Plaintiff has had far more than his due to complete discovery, but chose not to do so . . . [D]efendant has fully and fairly complied with its discovery obligations, toeing the mark in the letter and the spirit of discovery rules. Plaintiff is not entitled to more.

Cf. Wang ex rel. United States v. FMC Corp., 975 F.2d 1412, 1420 (9th Cir. 1992) (finding that *qui tam* relator who had "searched through thousands of documents and conducted extensive discovery" had failed to produce sufficient evidence to support an inference of fraud).

In a final effort to salvage his case, Cimorelli has moved the court to order GE to authorize the Justice Department to release any and all evidence it may have obtained under a civil investigative demand ("CID") served upon GE.[5] The court is aware of no legal basis for the issuance of such an order. According to the explicit language of the FCA, the materials produced pursuant to a CID cannot be released to "any individual other than a

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[5] Under the FCA, the Attorney General may issue a CID whenever she "has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation." 31 U.S.C.A § 3733(a) (1) (West Supp. 1992).

false claims law investigator or other officer or employee of the Department of Justice," unless consent is given by the person who produced the materials. 31 U.S.C.A. § 3733(i)(2)(C) (West Supp. 1992). In this case, GE has explicitly denied its consent to the government's release of any materials to Cimorelli or his attorney.

III.

CONCLUSION

For all of the foregoing reasons, GE's motion for summary judgment is ALLOWED. Cimorelli's motion for an order compelling GE to authorize the Justice Department to release any and all evidence of fraud obtained by it under a civil investigative demand is DENIED.

An order will issue.

By the Court,

/s/ Joseph L. Tauro
United States District Judge

Subchapter III – Claims Against
the United States Government

§ 3729 False Claims

(a) Liability for certain acts. – Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of public property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt.

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the Unites States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. – For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. – For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. – Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. – This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954.

§ 3730 Civil actions for false claims

(a) Responsibilities of the Attorney General. – The Attorney General diligently shall investigate a violation

under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons. – (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General gives written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government under Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to Qui Tam actions. – **(1)** If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case may, in its discretion, impose limitations on the person's participation, such as –

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera, that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternative remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam plaintiff. – (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall not be less than 25 percent and not more than 30 percent of the proceeds of the

action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney's fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred. – (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in section 201(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. – The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. – In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

§ 3731 False claims procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought –

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

Supreme Court, U.S.
FILED
JUN 3 1994
OFFICE OF THE CLERK

No. 93-1770

In The

Supreme Court of the United States

October Term, 1993

SALVATORE A. CIMORELLI,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN A. KAUFMAN
Counsel of Record
ROPES & GRAY
Attorneys for Respondent
One International Place
Boston, Massachusetts 02110
(617) 951-7000

5287
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

LIST OF ALL PARTIES

Petitioner and respondent are identified in the caption. Respondent General Electric Company has no parent company. The following subsidiaries of General Electric Company have issued securities to the public:

GECC Financial Corporation

General Electric Capital Corporation (formerly General Electric Credit Corporation)

General Electric Capital Canada, Inc.

General Electric Credit International, N.V.

General Electric Financial Services, Inc.

Montgomery Ward Credit Corporation

Montgomery Ward & Co., Incorporated

CAMCO, Inc. (Canada)

No. 93-1770

In the

Supreme Court of the United States

October Term, 1993

SALVATORE A. CIMORELLI,

Petitioner,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS POSED BY THE PETITION ARE NOT PRESENTED BY THE CASE.

The petition poses two questions, neither of which is presented by the case. The first posed is whether the First Circuit was correct in requiring the production of direct evidence in opposition to summary judgment. Petition at i. In fact, neither the

First Circuit nor the district court imposed any such requirement. Neither of the courts below discussed, let alone relied upon, a distinction between direct and circumstantial evidence. Indeed, the First Circuit affirmed summary judgment for the stated reason that Cimorelli had produced "no evidence whatever" of an essential element of his claim. Petitioner's Appendix ("Pet. App.") at A-4, *Cimorelli v. General Elec. Co.*, No. 93-1549, slip op. (1st Cir. Feb. 4, 1994) (per curiam).

The second question posed in the petition is whether the First Circuit was correct in requiring Cimorelli to discredit GE's explanations of changes to labor vouchers. Petition at i. Again, the First Circuit imposed no such requirement. Indeed, the First Circuit stated that if summary judgment depended on a choice between GE's explanations and Cimorelli's, there "might well be an issue for the jury." Pet. App. at A-4. The dispositive factor was simply that Cimorelli failed to produce any evidence to support his explanation. *Id.*

II.

THE FIRST CIRCUIT ENUNCIATED NO RULE OF LAW THAT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT.

The First Circuit did not enunciate a new legal rule, but merely applied settled law to the particular facts of this case. The rule articulated by this Court provides that when opposing summary judgment, the party with the burden of proof must set forth evidence sufficient to avoid a directed verdict at trial. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248-52 (1986). Applying this same rule, the First Circuit asked "whether Cimorelli pointed the district court to sufficient evidence to permit a reasonable jury to find that a false or fraudulent claim was presented to the federal government." Pet. App. at A-3. Since a false claim is an essential element of a violation of the False Claims Act, *United States v.*

McNinch, 356 U.S. 595, 598-99 (1958), Cimorelli's failure to provide any evidence of this element merited summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986).

Cimorelli's assertion that the First Circuit was "required" to infer from altered documents that a false claim had been made, Petition at 11, is contrary to law. In response to this argument, the First Circuit properly stated that while "[i]nferences are normally drawn in favor of the party opposing summary judgment . . . more than mere suspicion or speculation is required to justify a trial." Pet. App. at A-3 (citing *Liberty Lobby*, 477 U.S. at 249-50); *see also, Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986).

United States v. Hangar One, 563 F.2d 1155 (1977), is not to the contrary. In that case, the government's evidence included the receipt of defective artillery shells and affiants who testified to their personal involvement in acts of fraud. *Id.* at 1157-58. Here, however, Cimorelli is unable to point to any proof whatever that the government received a "defective" claim. Besides, the linguistic formulation of the summary judgment standard in *Hangar One* predates this Court's formulation of the standard in *Matsushita, Celotex,* and *Liberty Lobby.* No longer can mere "matters of speculation," *Hangar One*, 563 F.2d at 1158, defeat summary judgment. *See Matsushita,* 475 U.S. at 586 (stating that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts").

The petition presents no controversy concerning any matter of law. Instead, it focuses on the First Circuit's application of law; specifically, the court's refusal to infer what Cimorelli claims. As such, the petition does not pose an issue meriting this Court's review. *See General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.").

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

STEVEN A. KAUFMAN
Counsel of Record
ROPES & GRAY
Attorneys for Respondent
One International Place
Boston, MA 02110
(617) 951-7000